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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. When a state has decided to provide care—food, shelter, clothing, reasonable safety and medical care—to a severely mentally retarded individual in an institutional setting, does it thereby assume the burden, as a matter of substantive due process, (1) to provide treatment to that person which is acceptable in light of present medical or other scientific knowledge and the least intrusive available under the circumstances; (2) to refrain from any use of restraints on him, absent a showing of "compelling necessity;" and (3) to protect him from harm, however caused, absent a showing of "substantial necessity?"

2. When a court of appeals creates new constitutional rights in considering a claim for damages under 42 U.S.C. § 1983, and the record at trial contains no evidence of malice or intent to injure by the defendants, should the claim be dismissed on qualified immunity grounds as a matter of law?

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BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 644 F.2d 147 (Pet.

App. 1a).[1] The judgment of the District Court (J.A. 83a) and its opinion on defendants' motion to dismiss (Pet. App. 79a) were not reported.

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision on November 24, 1980. Petitioners filed their petition for writ of certiorari on February 23, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 and Section 406(a) of Pennsylvania's Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4406. The relevant portions of these provisions are reproduced in the petition for writ of certiorari (Pet. 2-3).

STATEMENT OF THE CASE

This is an action under 42 U.S.C. § 1983, which was commenced in the United States District Court for the Eastern District of Pennsylvania in 1976, on behalf of Nicholas Romeo, a resident of Pennsylvania's Pennhurst State School and Hospital.[2] The suit was brought seeking damages against three supervisory employees at Pennhurst challenging certain conditions that allegedly existed there. After trial, a jury verdict was rendered

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[1] The following abbreviations will be used hereinafter: "Pet. App."—Appendix to the Petition for Writ of Certiorari; "Pet."—Petition for Writ of Certiorari; "J.A."—Joint Appendix; "R."—Notes of Testimony; and "D. Ex."—Defendants' Exhibit.

[2] Pennhurst is a state-operated institution for the mentally retarded. It was the focus of *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981).

in favor of the defendants. The Third Circuit vacated and remanded the case for a new trial.

Nicholas Romeo is a profoundly retarded, 33 year-old man. He lived with, and was cared for, by his parents until his father died in May 1974 (R. 1-31). Twelve days later, Romeo was admitted to Pennsylvania Hospital Community Mental Health and Retardation Center, a community-based facility, suffering from multiple bruises and lacerations which were self-inflicted by banging against walls and other objects (D. Ex. 12; R. 7-69-70, 73). While there, Romeo required constant nursing care and occasional wrist and ankle restraints. *Id.*

In May of 1974, Romeo's mother initiated commitment proceedings by filing a petition with the Court of Common Pleas of Philadelphia County. She averred that she was unable to care for him because of his propensity for violence, and requested that he be committed to Pennhurst (J.A. 18a; R. 7-84). As part of the commitment process, Romeo was examined by a physician and by a psychologist (J.A. 21a, 28a). These professionals corroborated both Romeo's self-destructive tendencies and his inability to care for himself (J.A. 22a, 29a). On June 11, 1974, the Pennsylvania court granted his mother's petition and ordered Romeo committed to Pennhurst pursuant to state law (J.A. 32a; R. 7-85).

Between June, 1974 and November, 1976, when this action was filed, Romeo received medical care on a regular basis as well as a variety of treatment programs intended to curb his aggressive behavior and reinforce his self-help skills (R. 5-44-56, 242-50).[3] In addition,

[3] Following his admission to Pennhurst, Romeo underwent an admission physical examination (R. 4-152), and thereafter continued to receive medical care on a regular basis (R. 4-158). In addition, he underwent testing to determine his level of functioning and to evaluate the progress of the treatment which he was receiving at Pennhurst (R. 5-18-26). One purpose of this testing and

other treatment programs were designed for Romeo but never provided only because of his mother's objections (R. 1-52-53; 5-31, 56, 237-39).

In November, 1976, Romeo's mother, filed this action on his behalf. The original complaint sought damages and injunctive relief from three of Pennhurst's supervisory officials,[4] who allegedly knew that Romeo had suffered injuries and failed to create procedures which would have prevented them from occurring. These institutional conditions allegedly violated Romeo's rights under the Eighth and Fourteenth Amendments.

In late 1977, Romeo was transferred from the ward to the infirmary at Pennhurst after sustaining an injury (Pet. App. 89a). While in the infirmary he continued to receive treatment (R. 5-237). Shortly thereafter, Romeo filed a second amended complaint alleging that defendants had kept him physically restrained to a bed or chair in the infirmary for long periods of time each day (Pet. App. 86a-92a). Romeo also sought damages, for the first time, for defendants' alleged failure to

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the various treatment programs provided to Romeo was to eliminate his aggressive behavior toward other residents and thereby reduce the number of injuries sustained from their retaliatory conduct (R. 5-26). Another purpose was to reinforce and promote development of Romeo's self-help skills, such as toileting, showering and dressing (R. 5-44-56).

Moreover, in February of 1976, the ward team responsible for the care and treatment of Romeo met and developed a comprehensive program of behavorial modification which they proposed to implement for Romeo (R. 5-229). Again, one purpose of this behavorial modification program was to protect him from injury (R. 5-235). This program was never placed into effect because Romeo's mother, refused to approve it (R. 5-56, 237-39).

[4] Defendants are Duane Youngberg, then Superintendant at Pennhurst, Richard Matthew, then Director of Resident Life, and Marguerite Conley, Director of Romeo's unit. Youngberg and Matthew are no longer at Pennhurst.

provide him with appropriate treatment throughout his stay at Pennhurst. Injunctive relief was also sought in this pleading but was withdrawn prior to trial.

An eight day jury trial was held in April of 1978. At trial, the District Court denied a jury instruction proposed by Romeo asserting that he had: (1) a right to "such treatment as will afford [him] a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit" (Pet. App. 94a-95a) and (2) a right to treatment "under the least restrictive conditions consistent with the purpose of the commitment" (Pet. App. 95a). In so doing, he noted that "this is not a malpractice suit" (J.A. 48a).[5]

Rather, the District Court instructed the jury, as requested by Romeo (Pet. App. 93a), that "if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo," such failure deprived him of constitutional rights (J.A. 73a). The jury was also instructed that if defendants caused Romeo to be shackled other than in a good faith effort to treat him, then his rights were violated (J.A. 73a). Finally, the jury was instructed that if Romeo was denied programs "as a punishment for filing this lawsuit," or if defendants were "deliber-

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[5] The District Court had previously refused, on similar grounds, to permit plaintiff to present the testimony of two experts who, according to plaintiff, would have testified that plaintiff's treatment programs at Pennhurst were inappropriate and that his injuries were the result of the failure to provide more appropriate treatment (Pet. App. 97a-101a, 102a-104a). Plaintiff also represented that one of those experts would have testified that, while restraints are a proper mode of treatment in some cases, they were used improperly in plaintiff's case. The District Court excluded the testimony, ruling that, while it might be relevant to an issue of malpractice, it had no relevance to the constitutional claims (Pet. App. 101a, 105a, 109a).

ately indifferent to the medical and psychological needs of Nicholas Romeo," his constitutional rights were violated (J.A. 73a-74a).[6] The trial judge based his charge on the Eighth Amendment (J.A. 73a-75a).[7]

The jury returned a verdict for all defendants.

On appeal, the Third Circuit vacated the judgment of the District Court and remanded for a new trial. 644 F.2d 147 (Pet. App. 1a). All of the judges agreed that the Eighth Amendment was inapplicable and the expert testimony should have been admitted. However, the court was sharply divided, five-to-four, as to the nature of the substantive due process rights of the institutionalized mentally retarded. *Id.*

The majority found that the Fourteenth Amendment generated three separate areas of constitutional rights: (1) a tri-partite right to treatment, (2) a right against undue bodily restraint and (3) a right to protection from harm and personal security. *Id.* at 159 (Pet. App. 14a).

As to the treatment rights, the majority held that all institutionalized mentally retarded persons are categorically entitled to treatment unless there is a "compelling explanation" for the failure to provide it. *Id.* at 173 (Pet. App. 47a). Once some treatment is pro-

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[6] A standard good faith immunity charge was also given (J.A. 76a-77a).

[7] The complaint and points for charge submitted by plaintiff assert liability based on the Eighth and Fourteenth Amendments (Pet. App. 93a-96a). The District Court obviously construed the claims as arising solely under the Eighth Amendment as made applicable to the states under the Fourteenth Amendment. *See* opinion on motion to dismiss (J.A. 79a-84a); charge to the jury (J.A. 71a-75a). The Court of Appeals disagreed. While recognizing plaintiff's failure to assert clearly the Fourteenth Amendment as a separate legal basis for relief, the Third Circuit construed the complaint as asserting substantive due process claims. 644 F.2d at 155 n.2 (Pet. App. 6a).

vided, the Fourteenth Amendment requires that it be "acceptable . . . in light of present medical or other scientific knowledge." *Id.* at 169, 173 (Pet. App. 38a, 47a). The majority also held that defendants must demonstrate "a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations." *Id.* at 173 (Pet. App. 47a). A third level of constitutional treatment rights arises, according to the majority, where "severe intrusions on individual dignity," or "a significant loss of individual liberty is involved." *Id.* at 166, 173 (Pet. App. 30a, 47a). In those instances, an institutionalized mentally retarded person is entitled to "the least intrusive treatment available under the circumstances." *Id.* at 173, 166 (Pet. App. 47a, 31a-32a).

With respect to the conditions of confinement in institutions, the Third Circuit majority held that the mentally retarded have a constitutional right to be free of physical restraints unless justified by a showing of "compelling necessity"—by defendants' proving at trial that they were necessary to protect or treat the resident. *Id.* at 160 (Pet. App. 18a). Moreover, defendants must also establish that the restraints used were "the least restrictive method of dealing with the patient, in light of his problems and the surrounding environment." *Id.* at 161 (footnote omitted) (Pet. App. 18a-19a). The majority also found a constitutional right to personal security or to protection from harm by other residents of the institution absent a showing of "substantial necessity" by defendants. *Id.* at 164 (Pet. App. 25a).

With respect to the issue of whether defendants were immune from liability for damages, the majority deferred ruling on this question until a jury was given the opportunity on remand to determine the "possibility of immunity." *Id.* at 172 (Pet. App. 43a).

The concurring judges disagreed sharply with the majority's conclusions concerning the constitutional rights of the retarded. Chief Judge Seitz, in an opinion joined in by the other three concurring judges, concluded that the majority had erred in establishing its "multilevel standards" and that a unitary standard should be applied instead. *Id.* at 175 (Pet. App. 52a). Moreover, he found the standards applied by the majority unnecessarily strict and, in many ways, indistinguishable from malpractice. *Id.* at 177 (Pet. App. 56a). According to Chief Judge Seitz, the proper standard for evaluating defendants' conduct was whether there was "such a substantial departure from accepted professional judgment, practice or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment." *Id.* at 178 (Pet. App. 59a). The constitution, he concluded, "only requires that the courts make certain that professional judgment in fact was exercised." *Id.* at 178 (Pet. App. 58a).

Defendants filed a petition for writ of certiorari on February 23, 1981. Thirty-five states and the American Psychiatric Association filed *amici curiae* briefs urging the Court to grant the writ. Certiorari was granted on May 18, 1981.

SUMMARY OF ARGUMENT

Plaintiff was properly committed to a state institution for the mentally retarded because he was unable to satisfy his basic needs for food, shelter, reasonable safety and medical care. By assuming responsibility for satisfying these needs, the Commonwealth did not assume a constitutional duty to provide him with additional services, such as treatment—that training and education necessary to maximize his developmental potential. Rather, having properly committed plaintiff in order to provide

him care, the Commonwealth is required only to maintain conditions of commitment which are rationally related to that purpose or other legitimate state interests, and not to take action which is plainly an exaggerated, totally unnecessary method of achieving one of those objectives. Among the legitimate interests involved are the provision of care or treatment, protection of plaintiff and other individuals in the facility, efficient and economical management of the facility, and security.

Viewed against this standard, the Third Circuit plainly erred in holding that, as a matter of substantive due process, the institutionalized mentally retarded have a right (1) to receive treatment which is both acceptable in light of present medical or other scientific knowledge and the least intrusive available under the circumstances, (2) to be free of bodily restraints, absent a showing of compelling necessity, and (3) to be protected from harm, however caused, absent a showing of substantial necessity. Under the proper standard, the record is devoid of any evidence that the defendants violated plaintiffs' rights, and the trial judge did not commit reversible error in his instructions to the jury or in his exclusion of testimony from plaintiff's expert witnesses.

In any case, the constitutional rights created by the Third Circuit certainly were not clearly established at any time prior to trial, and thus could not have been known to defendants at that time. Because the record would not support a finding of subjective bad faith—malice or an intent to injure plaintiff—the decision of the Court of Appeals should be vacated on the grounds of qualified immunity.

ARGUMENT

I. INTRODUCTION

Respondent in this case is a severely mentally retarded person who was committed to a state institution after a full hearing and a judicial determination that he was incapable of caring for himself in the community. Thus, procedural due process is not an issue in this case.[8]

Nor is there any question that Romeo was unable to satisfy his basic needs for food, shelter and medical care. In the petition for commitment, his mother, Paula Romeo, stated that she was "unable to handle him," "he is [sic] constant 24 hr. care" and she was "unable to care for him" (J.A. 18a). Romeo's need for care was confirmed by the physician and psychologist who examined him prior to his commitment. The physician noted that Romeo "[m]ust be fed and required constant care" (J.A. 22a); the psychologist stated that he "has no feeding, dressing, or washing skills," and "is dependent on others for his maintenance and completion of daily tasks" (J.A. 28a-29a). In short, he was not "capable of surviving safely in freedom" even "with the

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[8] There is no question that involuntary confinement to a state mental institution is a deprivation of liberty which must be accompanied by procedural due process protection. *Addington v. Texas*, 441 U.S. 418, 425 (1979). In Pennsylvania, the MH/MR Act provides numerous procedural protections, including notice, examination by a court-appointed physician and a hearing before commitment, Section 406, Pa. Stat. Ann. tit. 50 § 4406; and post-commitment provisions addressing when and how the committee may be released, Section 418, 420 and 426, Pa. Stat. Ann. tit. 50 §§ 4418, 4420, 4426. However, as Chief Justice Burger noted in *O'Connor v. Donaldson*, 422 U.S. 563, 587-88 (1975) (Burger, C.J. concurring), there is "no basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without [procedural] due process of law with a constitutional right to treatment."

help of willing and responsible family members. . . ." *See O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

Thus, in this case, the Court must determine the substantive post-commitment constitutional rights of a mentally retarded person who has been properly committed because of an inability to care for himself in the community. Specifically, do such persons have a right, under the Due Process Clause of the Fourteenth Amendment, to receive services beyond that care—food, clothing, shelter, reasonable safety, and medical care—necessary to their survival? Or, has a state, which chooses to care for those of its citizens who are unable to care for themselves, also assumed a constitutional duty to guarantee their safety from all injuries and to provide treatment directed at maximizing their development. And, if it is true that assuming the task of care implies incurring the burden of treatment, must that treatment be provided in the least restrictive manner possible? Finally, if Pennsylvania has assumed such constitutional duties, has it fulfilled these obligations as to Romeo?

II. RIGHTS OF THE INVOLUNTARILY INSTITUTIONALIZED MENTALLY RETARDED

A. Overview

The substantive due process rights of the involuntarily [9] institutionalized mentally retarded is an issue of first impression. However, its determination requires atten-

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[9] In a sense, Romeo could be viewed as a voluntary resident of Pennhurst. Although challenging the conditions at Pennhurst, neither he nor his mother has sought his release (R. 1-60-62). Indeed, it was the same person, his mother, who sought his commitment and who now brings this action, on his behalf, challenging the conditions of that commitment. However, because his commitment was court-ordered, after hearing, defendants do not argue here that he was voluntarily committed.

tion to a number of considerations previously recognized by this Court.

First, this Court has repeatedly held that states are under no affirmative constitutional obligation to provide its residents with governmental services. *E.g.*, *Harris v. McCrae*, 448 U.S. 297 (1980) (publicly funded abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (medical treatment). Accordingly, no court has ever found that the constitution requires a state to provide mental health or mental retardation services to its residents.

As importantly, when states choose to provide services, they must be given a great deal of latitude in doing so. *Richardson v. Belcher*, 404 U.S. 78, 83-84 (1971); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970). Specifically, states need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge*, *supra* at 486-87. Thus, where a person is committed to a state mental institution for the purpose of providing care, it is sufficient that care be provided.[10] The state is not required to provide both care and treatment or forego commitment entirely, leaving the mentally disabled to their own devices.[11]

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[10] As used herein, the term "care" includes the provision of food, shelter, clothing and medical care, as well as reasonable safety. *See Goldy v. Beal*, C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976) (Consent Order). In contrast, "treatment" or "habilitation" means "'that education training and care required by retarded individuals to reach their maximum development.'" Although the terms "treatment" and "habilitation" may be used interchangeably, "habilitation" is the more accurate term describing services for the mentally retarded. *Romeo v. Youngberg*, 644 F.2d at 176 (Seitz, C.J., concurring) (Pet. App. 54a).

[11] Similarly, there is no constitutional duty to provide any services absent a deprivation of liberty. *O'Connor v. Donaldson*, *supra* at 575. Thus, any constitutional obligation owed to Romeo would be obviated by his release from Pennhurst.

This Court has also recognized that in evaluating cases involving other types of state institutions, deference must be afforded to the expert judgment of those officials responsible for operating the institution. *Cf. Bell v. Wolfish*, 441 U.S. 520, 541 (1979) (prison officials). This should be especially true where those judgments involve the "baffling" areas of care and treatment for the mentally ill and mentally retarded. *See Parham v. J.R.*, 442 U.S. 584, 606-09 (1979).

Finally, the involuntarily institutionalized mentally retarded in Pennsylvania have state law tort and statutory remedies available to test the conditions of their confinement. Applicable state law tort actions could include malpractice, other negligence, false arrest and assault.[12] In addition, the Supreme Court of Pennsylvania has recognized a cause of action based on the Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4401 *et seq. Freach v. Shovlin*, 471 Pa. 588, 370 A.2d 1163 (1977).

The importance of these state law remedies has been highlighted by this Court's recent decision in *Parratt v. Taylor*, 101 S. Ct. 1908 (1981), in which the Court concluded that a negligent deprivation of property[13] did not occur without due process of law because the plaintiff had an adequate tort remedy under Nebraska law. In so holding, the Court reaffirmed the principal that the Fourteenth Amendment is not intended to be a "font of

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[12] No state law claim has been pled here. *See* Second Amended Complaint (Pet. App. 86a-92a).

[13] While *Parratt* involved a deprivation of property and not liberty, the Court relied on two liberty cases in reaching its decision: *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Paul v. Davis*, 424 U.S. 693 (1976). 101 S.Ct. at 1916-17. Moreover, there is no logical basis for distinguishing the negligent deprivation of property from the negligent deprivation of liberty alleged in this case.

tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 1917.[14]

That reasoning is equally compelling in resolving the substantive due process claims raised in this case. To accept Romeo's claim that the conduct complained of in this case constituted a violation of substantive due process "would almost necessarily result in turning every alleged injury . . . [occurring in an institution for the mentally retarded] into a violation of the Fourteenth Amendment cognizable under § 1983." *See id.* As in *Parratt*, "[i]t is hard to perceive any logical stopping place to such a line of reasoning." *See id.* Accordingly, while the existence of state law remedies may not foreclose plaintiff's substantive due process claims, this Court should be reluctant to recognize constitutional claims identical to those cognizable under state law.

It is with these considerations in mind that Romeo's substantive due process claims should be viewed.

B. Substantive Due Process Rights of the Involuntarily Institutionalized Mentally Retarded

The Due Process Clause of the Fourteenth Amendment prohibits state deprivations of life, liberty or property without due process of law. Substantive due process, in

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[14] Specifically, the Court recognized that:

> [t]o accept respondent's argument that the conduct of state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. . . . Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Paul v. Davis*, 424 U.S. 693, 701. We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Id.

particular, bars such deprivations without sufficient justification. Generally, one of two standards has been applied to determine whether any given state action is justified. Where fundamental rights are involved, the Court has inquired into whether the infringement of those rights was justified by a compelling state interest.[15] Otherwise, the Court has employed the traditional due process test—whether the activity at issue is rationally related to any legitimate state interest.[16]

Although this Court has never before determined the substantive due process rights of institutionalized mentally retarded persons, in *Bell v. Wolfish*, *supra*, it discussed the rights of another group of institutionalized individuals—pre-trial detainees. In *Bell*, the Court held that so long as the conditions of confinement are reasonably related to a legitimate, nonpunitive government objective, 441 U.S. at 539, and there is not substantial evidence that the government officials in question have

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[15] In the last twenty years, fundamental right analysis has been used almost exclusively where "the individual's freedom of choice with respect to certain basic matters of procreation, marriage and family life" was involved. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976). *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Stanley v. Illinois*, 405 U.S. 645 (1972) (father's custody rights); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptives). This caution has been based on a recognition that the Due Process Clause should not be used as a vehicle to substitute judicial judgments for those of legislative and executive branches. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941).

[16] *See, e.g., Bell v. Wolfish, supra; Harrah Independent School District v. Martin*, 440 U.S. 194 (1979).

In the last ten years, in both due process and equal protection cases, the trend appears to be toward a single rational relationship standard of review. *See Bell, supra* (rights of pre-trial detainees); *Weinberger v. Salfi*, 422 U.S. 749 (1975) (limiting "irrebuttable presumption" doctrine in due process cases).

made an exaggerated response to these objectives, *id.* at 548, courts should not interfere with their expert judgment in operating the institution. *Id.* Applying this standard, the Court recognized that the confinement of pre-trial detainees was justified by the state's legitimate interest in ensuring the detainees' presence at trial. It went on to find other legitimate interests stemming from the need to manage the facility and held that they too could justify conditions of confinement. *Id.* at 541.

Here, as in *Bell*, the interests "involved simply [do] not rise to the level of those fundamental liberty interests delineated in cases such as *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923)." 441 U.S. at 534-35. Thus, the rational relationship test utilized in *Bell* is equally applicable here and the same result is required.

In applying that test, the first question is whether a legitimate state interest exists. In this regard, commitment of the mentally disabled involves a number of legitimate state interests. The generally articulated bases for such commitments include danger to self, danger to others and the need for care, treatment or training. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972). This Court has specifically recognized the states' interest (1) in providing care to its citizens who are unable because of emotional disorders to care for themselves, and (2) in protecting the community from the dangerous tendencies of those who suffer from mental disabilities. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

This recognition is consistent with the fact that, historically, the mentally disabled were confined simply to provide them with custodial care. *See O'Connor v. Don-*

aldson, 422 U.S. at 582 (Burger, C.J., concurring).[17] The theory that the states may only confine such persons if they provide treatment is a comparatively recent phenomenon. *See id.* Despite recent developments in the treatment of the mentally ill, it is unquestionable that some forms of mental illness continue to be untreatable in terms of finding a real "cure". *See* Schwitzgebel, *The Right to Effective Mental Treatment*, 62 Cal.L. Rev. 936, 941-48 (1974). Where the mentally retarded are concerned, talk of a "cure" is misleading. The goal, at best, is to improve the person's condition.[18] Thus, discussion of treatment as the sole constitutional basis for confining the mentally retarded is simply unrealistic. *See Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84, 125 (3d Cir. 1979) (Seitz, C.J., dissenting), *rev'd*, 101 S.Ct. 1531 (1981).

Accordingly, Pennsylvania law recognizes that care is a basis for commitment of the mentally retarded. Section 406(a) of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4406 (a),[19] provides:

> Whenever a person is believed to be mentally disabled, and *in need of care or treatment* by reasons

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[17] *See also Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977), *rev'd and rem'd on other grounds*, 430 U.S. 322 (1977) (*per curiam*); Note, *Civil Commitment of the Mentally Ill*, 87 Harv. L.Rev. 1190, 1327 (1974) (hereinafter *"Civil Commitment"*).

[18] Indeed, there is even some debate as to whether the profoundly mentally retarded can benefit in any significant way from habilitation efforts. *See* Ellis, *The Partlow Case: A Reply to Dr. Roos*, 5 Law and Psychiat. Rev. 15, 19, 23 (1979).

[19] In *Goldy v. Beal*, 429 F.Supp. 640 (M.D.Pa. 1976), a three-judge court declared Section 406 to be unconstitutional on grounds of vagueness. Subsequently, a consent order was entered allowing commitment of a mentally retarded individual who is unable to provide "for his most basic need for nourishment, personal and medical care, shelter, self-protection and safety." *Goldy v. Beal*, C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976) (Consent Order).

> of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

(Emphasis added.)[20] Thus, while need for treatment is one basis for commitment under state law, need of care is another. Other provisions of the MH/MR Act support this conclusion. For example, Section 418 of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4418, provides: "If no period is specified in a commitment, the person may be detained until care *or* treatment is no longer necessary. . . ." (Emphasis added.)

Because provision of care is a legitimate state interest, so long as care is provided, the rational relationship test has been met. *See Bell v. Wolfish, supra; Jackson v. Indiana, supra.* Having provided care to the institutionalized mentally retarded, the state is not required to provide treatment as well. Rather, it is permissible that states deal with one problem at a time. *Dandridge v. Williams, supra.*[21]

To the extent specific conditions of confinement are being challenged, the rational basis test is again applicable. If the initial and most serious deprivation of

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[20] Prior to 1976, this provision also applied to commitment of the mentally ill. Since 1976, the mentally ill may be committed only if they are "severely mentally disabled and in need of treatment." Section 304(a) of the Mental Health Procedures Act, Pa. Stat. Ann. tit. 50 § 7304(a).

[21] Despite this limited constitutional obligation, Pennsylvania has been extremely responsive to the needs of its mentally retarded citizens. As the Third Circuit itself recently noted, Pennsylvania has allocated "an extraordinary large portion of its budget" to the mentally disabled. *Doe v. Colautti,* 592 F.2d 704, 711 (3d Cir. 1979).

liberty—commitment—can be justified by legitimate, rational state interests, there is no basis to require that post-commitment deprivations meet a higher standard. While commitment does not effect a forfeiture of all constitutional rights, the fact of commitment does permit those rights to be subject to restrictions and limitations so long as those limitations serve legitimate goals and policies of the institution. *See Bell v. Wolfish*, 441 U.S. at 546.

There are a number of legitimate state interests involved in the operation of institutions for the mentally retarded. They include provision of care or treatment, protection of the person, protection of other residents and persons in the facility, and efficient and economical operation of the institution. So long as the conditions of confinement are reasonably related to any of these objectives, and officials have not taken some extreme action which is plainly an exaggerated, unnecessary method of trying to achieve one of these objectives, no substantive due process violation has occurred. *See Bell v. Wolfish, supra.*

In light of these principles, the fundamental errors of the majority opinion of the Third Circuit are clear.

III. THE THIRD CIRCUIT ERRED IN EVALUATING THE RIGHTS OF THE MENTALLY RETARDED

A. Introduction

By its opinion, the Third Circuit has clearly established a constitutional cause of action for nearly any personal injury which may occur in a state mental institution. In so doing, the Third Circuit failed to explain why torts, such as malpractice, become constitutional violations merely because the victim is committed to an institution for the mentally retarded. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Indeed, considering the standards it proposed for these new causes of action, the Court of Appeals has apparently created a constitu-

tional strict liability claim for the institutionalized mentally retarded.

In Pennsylvania, malpractice has been defined as the unjustified departure from established standards of medical practice. *Incollingo v. Ewing*, 444 Pa. 263, 282, 282 A.2d 206, 217 (1971). The Third Circuit apparently used this definition as a starting point, requiring that treatment be regarded as "acceptable for him in light of present medical or other scientific knowledge." 644 F.2d at 169 (Pet. App. 38a). However, it then broke entirely new ground by requiring a higher standard be met where (1) no treatment was given ("compelling explanation"); (2) a significant deprivation of liberty has occurred ("least intrusive"); or (3) restraints have been used ("compelling necessity"). Significantly, unlike state law torts, the burden is on a defendant to prove that these standards have been met. Thus, while this Court has cautioned against turning malpractice into a "constitutional violation," *see Estelle v. Gamble*, *supra* at 106, the Third Circuit has established constitutional torts which would not even be actionable under state law.

The Third Circuit's holding graphically illustrates this Court's recognition that courts are poorly equipped to make medical judgments. *See Parham v. J.R.*, *supra*.[22] For example, in deciding that "mental retardation professionals have relegated the use of physical restraints to the closets of an earlier age," 644 F.2d at 160 (Pet. App. 18a), and that the use of restraints was presumptively punitive, *id.* at 159 (Pet. App. 15a), the Court of Appeals made the purest kind of medical decision. Moreover, that judgment was absolutely incorrect.[23] Indeed,

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[22] *See generally* Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. Chi. L. Rev. 755, 782 (1969); *Civil Commitment*, *supra* note 17, at 1333-34.

[23] Recent commentaries support use of restraints in treatment programs. *See, e.g.*, Bursten, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 25 Hosp. and Comm. Psychiat. 757 (1975); Gutheil, *Restraint Versus Treatment: Se-*

even one of plaintiff's experts would have conceded the propriety of using restraints for treatment in certain cases (Pet. App. 101a).

In addition, the various and multi-leveled rights created by the Third Circuit are conflicting, confusing, impractical and unnecessarily complex. For those who must follow them, they are nearly impossible to understand, let alone implement. For example, it is far from clear what the court meant by "compelling necessity," "substantial necessity," and "least intrusive treatment available." *See Romeo v. Youngberg, supra* at 175 (Seitz, C.J., concurring) (Pet. App. 51a). Nor is it clear which test applies when treatment involves the use of restraints. *See id.* Finally, an aggressive patient's right to be free of restraints and receive the least intrusive treatment cannot necessarily be reconciled with another patient's right to be protected from harm. Thus, when the "rights" of two patients are considered, conflict becomes almost unavoidable and a Hobson's choice is presented.

The entire substantive due process analysis of the Third Circuit is based on the incorrect premise that the conditions of commitment challenged in this case involve "fundamental liberty interests." In accepting that premise, the lower court recognized that this Court rejected the "compelling necessity" standard in *Bell v. Wolfish, supra.* 644 F.2d at 158 n. 15 (Pet. App. 11a). However, it attempted to distinguish *Bell* on the basis, *inter alia,* that the detainees in that case received greater procedural protections under criminal process.[24] Under

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clusion as Discussed in the Boston State Hospital Case, 137 Am. J. Psychiat. 718 (1980); Rosen *et al., The Role of Physical Restraint in the Treatment of Psychiatric Illness,* 39 J. Clin. Psychiat. 228 (1978); Soloff, *Physical Restraint and the Nonpsychotic Patient, Clinical and Legal Perspectives,* 40 J. Clin. Psychiat. 302 (1979). *See also* 42 C.F.R. § 442.438 (Medicaid regulation allowing use of restraints where necessary to protect from harm).

[24] Besides being irrelevant, this distinction is false. The involuntarily committed have had a full hearing and final judicial

this analysis, the detainees in *Bell* had fewer substantive rights merely because greater procedural protections were provided to them by the criminal process. *See id.* Thus, the Third Circuit improperly "elevate[d] a concern for essentially procedural safeguards into new substantive constitutional rights." [25] *See O'Connor v. Donaldson*, 422 U.S. at 587 (Burger, C.J., concurring).

Finally, the practical ramifications of the Third Circuit's decision are most disturbing. The threat of personal monetary liability will inevitably discourage talented professionals from seeking or maintaining employment in state institutions. This is especially true when they are being held liable in damages for matters beyond their control. For example, there is no evidence that defendants had any control over the amount of money available to provide services at Pennhurst. Yet, the Court of Appeals found lack of funding to be no defense to at least one of Romeo's claims. 644 F.2d at 161 (Pet. App. 18a). *See also Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *pet. for cert. pending*, No. 80-1699. Moreover, to the extent that daily treatment decisions are at issue, the defendant supervisory officials in this case had no direct involvement in those decisions and are, therefore, being held vicariously responsible for the acts of others. *But see Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

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determination, based on clear and convincing evidence, as to the propriety of their confinement. *See Addington v. Texas, supra.* Pre-trial detainees, on the other hand, have had only a preliminary determination of probable cause to justify their detention. Obviously, the latter provides substantially less procedural protection.

[25] Its confusion was clear in its application of the procedural due process test set forth by this Court in *Mathews v. Eldridge*, 424 U.S 319 (1976), to evaluate the substantive due process rights of respondent, 644 F.2d at 160 n.26 (Pet. App. 16a-17a).

The Third Circuit's decision can only make it more difficult to hire and keep qualified personnel, an unfortunate and ironic result. In an apparent effort to aid the mentally disabled, the lower court has created a situation which could well result in a deterioration of the quality[26] of services due to the lack of top-notch personnel. Such a result is clearly contrary to the interest of the mentally retarded and the public. *See Romeo v. Youngberg, supra* at 185 (Aldisert, J., concurring) (Pet. App. 75a-76a).

B. Right to Treatment Claim

This Court has never held that either the involuntarily confined mentally ill or mentally retarded have a constitutional right to treatment. *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531, 1539 (1981). *See O'Connor v. Donaldson*, 422 U.S. at 573. Indeed, in its recent *Pennhurst* decision, the Court cited, with apparent approval, *Sanchez v. New Mexico*, 396 U.S. 276 (1970), in which the Court dismissed, for want of a substantial federal question, an appeal from a lower court decision holding that the involuntarily committed have no right to treatment.[27]

Among the other circuit courts of appeals, apparently only the Fifth and Eighth Circuits have found that due process includes such a right.[28] *See, e.g., Goodman v.*

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[26] Quantitatively, those services may also suffer. In light of the present trend of cutting government services in this country, it is not inconceivable that, if states are required to provide services at the level contemplated by the Third Circuit, state legislatures will conclude that it has simply become too expensive to provide the current level of services.

[27] *State v. Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969).

[28] The District of Columbia Circuit has recognized such a right in dicta, where statutory language also provided such a right. *See Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Lake v. Cameron*, 331 F.2d 771 (D.C. Cir. 1964).

Parwatikar, 570 F.2d 801 (8th Cir. 1978);[29] *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (subsequent history deleted); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vac'd and rem'd*, 422 U.S. 563 (1975). The Fifth Circuit, however, has retreated from this position, noting that it has "considerable doubts about the legal theory of a right to treatment." *Morales v. Turman*, 562 F.2d 993, 996 (5th Cir. 1977).

In finding a right to treatment, the Third Circuit adopted a form of "quid pro quo" theory.[30] Under this theory, the state must give something in exchange for the curtailment of freedom involved in civil commitments. That something, according to the Third Circuit, is treatment.

The fundamental flaw in this analysis is its assumption that treatment provides the sole underlying basis for commitment. 644 F.2d at 138 n. 18 (Pet. App. 13a). It ignores the fact that the state may validly confine the mentally ill or mentally retarded for reasons *other than treatment*. *See Addington v. Texas*, *supra*. *See also* pp. 16-18, *supra*. There is no constitutional duty to provide care *and* treatment, or nothing at all, to those, like Romeo, who are "helpless to avoid the hazards of freedom." *See O'Connor v. Donaldson*, *supra* at 574 n. 9. Thus, even under "quid pro quo" analysis, one who is validly committed for care, need only be provided care. Spece, *supra* note 30, at 14.[31]

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[29] In *Goodman*, the Eighth Circuit cited for this proposition *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977), in which the court approved, without discussion, the District Court's decision.

[30] There are apparently at least three different "quid pro quo" theories. *See* Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1, 4 (1978) (criticizing all "quid pro quo" theories).

[31] Moreover, for due process purposes, it is enough that there be "any state of facts either known or which could reasonably

Finally, where a right to treatment has been found, it has generally been in a situation where virtually no treatment at all is being given. *See Wyatt v. Aderholt*, *supra*; *Donaldson v. O'Connor*, *supra*. Here, there is no dispute that Romeo received treatment and programming while at Pennhurst (R. 5-44-56, 227, 242-50). Thus, the real issue here is not whether Romeo should have received treatment, but rather what kind and in what amount. There is no basis in the Due Process Clause for judicial decision-making of that sort. To the contrary, as this Court has recognized, it is precisely those types of decisions that courts are ill-equipped to make and should avoid. *See Parham v. J.R.*, *supra*. Accordingly, the Third Circuit clearly erred in finding a right to treatment in this case.

C. Least Restrictive Alternative Theory

The least restrictive alternative concept adopted by the Third Circuit in evaluating treatment involving "a significant deprivation of liberty" is totally unworkable and finds no basis in the decisions of this Court.[32] Regardless of whether any treatment right is found in this case, the "least intrusive" standard should be soundly rejected.

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be assumed" to support the challenged action. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). In addition, "[f]or those purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay" the decision in question. *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Thus, the lower court's incorrect holding that state law authorizes commitment only for treatment, *see* pp. 16-18, *supra*, is irrelevant to the due process question. So long as the need for care could justify commitment, the existence of a state law right to treatment is irrelevant for due process purposes.

[32] The discussion here also applies to the least restrictive standard which the Third Circuit would use in analyzing claims involving restraints.

This Court has never held that those committed to a state mental institution have a right to treatment in the least restrictive environment. *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. at 1539, *citing Sanchez v. New Mexico*, *supra*. Nor has this Court ever recognized a right to receive the "least intrusive treatment." Indeed, the development of those legal concepts precludes its extension to the area of health care.

The "least restrictive alternative" theory arose in the free speech area,[33] and has been used only where free speech or some other fundamental interest was involved. *See, e.g., Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977). Even then, the Court has only utilized the standard where a legislative determination—a statute or ordinance—was at issue. Certainly, the theory has never been applied by this Court to a continuing course of conduct.

It is, therefore, not surprising that this Court has recently criticized the concept, commenting that "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting...." *Pennhurst State School and Hospital*, *supra* at 1543. It would be anomalous to conclude that such vague terms are constitutionally based.[34]

This Court's criticism is justified by the holding in this case. The Third Circuit's "least intrusive treatment" analysis requires a balancing of the possibility of improvement against the risk of serious side effects in choosing a treatment approach. 644 F.2d at 166 (Pet. App.

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[33] *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). *See also* Richardson, *Freedom of Expression and the Function of the Courts*, 65 Harv. L. Rev. 1, 40 (1951) (least restrictive analysis criticized); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 473-74 (1968) (standard unworkable).

[34] The same reasoning applies to the "compelling necessity" standard. As the majority below recognized, these two standards are virtually indistinguishable. 644 F.2d at 161 n.27 (Pet. App. 18a). *See Shapiro v. Thompson*, 394 U.S. 618, 634-37 (1969).

31a-33a). The court, however, offered no meaningful guidance as to how this test should be applied by professionals in cases involving both risk and possibility of improvement, noting only that "[w]hen the state is the decision-maker . . . such actions should err on the side of safety." *Id.* at 166 n.45 (Pet. App. 32a).

Nearly all treatment involves some risk. Moreover, "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation. . . ." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). *See also Bell v. Wolfish*, 441 U.S. at 502 n. 40. Thus, the Third Circuit's standard is best satisfied by avoiding risk at all costs, opting for the safest, rather than the most beneficial, treatment. This result is unacceptable and cannot be constitutionally required.[35]

D. Restraint Claim

In creating a constitutional right to be free of restraints or shackles,[36] the Third Circuit broke totally new ground. The fundamental fallacy of this unprecedented decision is the lower court's total failure to recognize that restraints can play a role in the treatment, care and protection of the institutionalized mentally retarded. Indeed, even one of the plaintiff's experts was prepared to testify that the use of restraints is an acceptable

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[35] *See generally* Hoffman, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 San Diego L. Rev. 1100, 1107 (1977).

[36] The very use of the term "shackles" by the majority below is an obvious effort to conjure up visions of dungeons and medieval practices. *See* 644 F.2d at 159 n.22 (Pet. App. 15a). As the record establishes, three different types of restraints were actually used: a leather muff around the hands, "soft restraints," which secure a patient's arms or legs to a chair or bed, and metal restraints, which consist of a metal wrist or leg band attached to a leather belt which is then tied to a chair or bed (R. 4-170-71; 7-50-56). When restraints were used on Romeo, "soft restraints" were generally used (R. 7-54).

form of treatment (Pet. App. 101a). Moreover, it is not uncommon for the profoundly mentally retarded to be violent and abusive, either to themselves or others. *See Civil Commitment, supra* note 17.[37] Restraints are used to protect such persons from themselves and others, and indeed, their use for that purpose is recognized as proper in national standards promulgated by the federal government.[38] Thus, there is no factual basis for the lower court's assumption that the use of restraints "is not normally within the range of conditions of confinement contemplated in habilitative institutionalization," 644 F.2d at 164 (Pet. App. 16a), and, therefore no legal basis for that court's application of a compelling necessity standard to the use of restraints.

Rather, the state has a legitimate interest in the welfare of residents in a state institution, in protecting them from other violent residents and in protecting them from themselves. It is entitled to take steps that are reasonably related to that interest.[39] Use of restraints serves these interests, and therefore satisfies due process.

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[37] *See generally* Eyman, *Maladaptive Behavior and Community Placement of Mentally Retarded Persons*, 82 Am. J. Ment. Deficiency 137 (1977); Moen, *Follow-up of Mentally Retarded Adults Successfully and Unsuccessfully Placed in Community Group Homes*, 26 Hosp. and Comm. Psychiat. 754 (1975).

[38] Regulations under Title XIX of the Social Security Act specifically recognize the use of physical restraints for the mentally retarded where necessary "to protect the resident from injuring himself or others." 42 C.F.R. § 442.438.

[39] The Third Circuit's difficulty in recognizing any legitimate use of restraints may spring from its misreading of state law, an issue which neither side had raised. Section 422 of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4422, provides for the use of mechanical restraints within an institution where "the director of a facility or his designee determines that such are required by the medical needs of such person . . . , in accordance with regulations of the [D]epartment [of Public Welfare]. Department regulations generally provided for the use of restraints on the order of a physician "for the purpose of protecting the patient or others from aggressive acts of the patient." 7 Pa. Bull. 3199 (Oct. 29, 1977). While the majority below felt that the director "or his designee" had not

E. Protection From Harm Claim

The trial judge instructed the jury that "if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo," such failure deprived him of constitutional rights (J.A. 73a). This was precisely the language requested by Romeo in a proposed jury instruction (Pet. App. 93a).[40] In contrast, the Third Circuit majority concluded, *sua sponte*, that the jury should have been instructed that Romeo had a constitutional right to personal security and protection from attack by other residents, unless defendants could show substantial reasons or necessity as to why the attacks occurred despite their attention. 644 F.2d at 164, 172-73 (Pet. App. 25a, 46a). The Third Circuit standard, which places a heavy burden of proof on defendants, should be rejected.[41]

While this Court has recognized, in the context of procedural due process, that the liberty preserved by the Due Process Clause includes freedom from bodily restraint and punishment, *see Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), it has never held that the state has a substantive obligation to guarantee the safety of its citizens. The involuntarily committed may well argue that state officials have some duty to protect them from

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approved the use of restraints, 644 F.2d at 159 n.21 (Pet. App. 14a), restraints were only used on Romeo at the direction of a staff physician (R. 5-221; 6-59, 67, 141; 7-76), thus satisfying the requirements of state law.

[40] In all, Romeo requested three separate instructions on this issue (Pet. App. 93a, 94a, 96a). All three were affirmed by the District Court (J.A. 44a, 48a).

[41] The Third Circuit's reliance on Section 401 of the MH/MR Act, Pa. Stat. Ann. tit. 50 § 4401, is misplaced. Section 401(c) of the Act simply provides for commitment to a facility which is "willing and able to receive him." It is silent on any right to protection from harm, and no state court has ever suggested such a strained interpretation. Indeed, neither side even raised this section in the courts below.

repeated attacks of which the officials knew or should have known, but there is no basis to argue that their rights go beyond the District Court's instruction here. To require defendants to make a showing of substantial necessity would be an unprecedented[42] shifting of the burden of proof in civil rights actions amounting to a strict liability standard.

The inappropriate nature of such a standard of review is illustrated by the facts. While the Third Circuit refused to recognize that Romeo or any of the residents at Pennhurst are a danger to others, 644 F.2d at 158 n.18 (Pet. App. 13a), even the 1974 commitment papers of Romeo reflect dangerousness to himself and others: "he becomes violent—kicks, punches, breaks glass. . ." (J.A. 18a), according to his mother; and according to the examining physician, "[Romeo] is easily excitable," and was observed "banging his head against bedrail" (J.A. 22a). This dangerous nature continued to be demonstrated while at Pennhurst.[43] Considering this history and the fact that he was in a facility with other residents with similar tendancies, the number of injuries which he suffered while at Pennhurst, many of which were self-inflicted, is not unusually high.

Conceivably, violence between residents could be reduced by more use of restraints or isolation, but Romeo certainly would not have been happy with that solution. More importantly, interaction with other residents is in his best interests. In balancing these various interests,

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[42] The Third Circuit again appears to stand alone among the circuit courts of appeals in its recognition of a right to protection from harm. Several district courts have found such a right. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 446 F.Supp. 1295 (E.D. Pa. 1977) (subsequent history deleted); *New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973).

[43] *See, e.g.*, R. 1-37-39; 2-48-52; 5-37-40.

it is obvious that the solution lies with mental retardation professionals, and not with the courts.

IV. UNDER THE CORRECT STANDARD, IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL JUDGE TO EXCLUDE THE EXPERT TESTIMONY OFFERED BY PLAINTIFF

Admission of expert testimony rests with the sound discretion of the trial court and will not be overturned absent manifest error. *Spokane and Inland Empire Railroad Co. v. United States*, 241 U.S. 344, 351 (1915); *Spring Co. v. Edgar*, 99 U.S. 645, 656 (1878). In *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962), the Court recognized the general rule:

> [E]xpert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge if all the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation. . . .

See also Rhodes v. Chapman, —— U.S. ——, No. 80-332 (Jun. 15, 1981) (slip op. at 14-15 n.13) (expert testimony as to prison conditions not relevant on constitutional minima).

In this case, counsel for plaintiff sought to introduce the testimony of two expert witnesses, Dr. Richard Foxx and Dr. Warren Grover. By offers of proof, it was represented to the court that those witnesses would testify that the treatment programs provided Romeo at Pennhurst were inappropriate and that the use of appropriate treatment programs would have improved his condition.

Considering these offers, the District Court did not abuse its discretion in excluding the evidence. There is

simply no dispute that Romeo has received care and treatment throughout his commitment to Pennhurst. *See* note 3, *supra*. As is noted above, Romeo has no constitutional right to treatment, let alone to a specific quality or kind of treatment. Thus, testimony that more and/or better treatment could have been provided was irrelevant and properly excluded.

V. THE DISTRICT COURT JUDGMENT SHOULD BE REINSTATED

When the proper analysis of the constitutional claims is applied here, it is clear that the District Court judgment should be reinstated. If the trial judge erred at all in his instructions to the jury, when the charge is viewed as a whole, it was harmless error. Moreover, the record made before the District Court provides no basis for finding any constitutional violations by any of the defendants. Thus, because defendants' directed verdict motion should have been granted, the decision of the Third Circuit should be vacated with directions to affirm the judgment of the District Court.

As is noted above, the state had an obligation to provide conditions of confinement that were reasonably related to legitimate state interests. While the District Court gave jury instructions which were couched in Eighth Amendment terms, the charge, taken as a whole, adequately described the nature of plaintiff's constitutional rights. If anything, the trial judge erred in plaintiff's favor.

For example, the trial judge's instruction on protecting Romeo from harm required that the jury find a constitutional violation if it found that defendants "were aware of and failed to take reasonable steps to prevent repeated attacks upon Nicholas Romeo . . ." (J.A. 73a). Because this is the exact language requested by Romeo

(Pet. App. 93a-96a), it certainly could not provide the basis for reversible error on appeal. In any event, this instruction is either identical to or stricter than an appropriate due process instruction requiring that defendants' actions be rationally related to legitimate state interests.

As to the instruction on the use of restraints, the jury was instructed to find a constitutional violation if it found that Romeo was shackled as punishment, but to find for defendants if it found those acts were taken in a good faith effort to treat his condition (J.A. 73a). In requiring a good faith effort to "treat" Romeo in order to justify shackling, the lower court required, if anything, more than the necessary rational relationship to the care and protection of Romeo and others.

Finally, the instruction on whether defendants were deliberately indifferent to the medical and psychological needs of Romeo is roughly the equivalent of the proper instruction requiring that the conditions of confinement be rationally related to the provision of care. Accordingly, while the lower court may have erred in its instructions to the jury, the error, if any, was harmless.

In any case, under the proper constitutional standards, a directed verdict should have been granted to defendants. As one commentator stated:

> Errors in instructions routinely are ignored if a motion for a directed verdict should have been granted, or if the erroneous instruction went to an issue that is immaterial in the light of the jury's verdict, or if it otherwise is apparent that the error could not have changed the result.

11 Wright and Miller, *Federal Practice and Procedure* § 2886 (1973) (footnote omitted). The undisputed evidence at trial established that Romeo was not denied the basic necessities—food, shelter, clothing and medical care.

Indeed, he did not even allege such a denial. Thus, the rational relationship test has been met. Moreover, even if he were entitled to treatment, the record establishes that he received a variety of treatment and training programs designed to curb his aggressive behavior and improve his self-help skills.[44] The record similarly fails to evidence any improper use of restraints or failure by the defendants to take reasonable steps to protect Romeo from self-injuries or attacks by others.

In light of the undisputed evidence at trial, defendants' directed verdict motion should have been granted. Thus, regardless of the charge to the jury, a verdict for defendants was mandated by the evidence.

VI. THE THIRD CIRCUIT ERRED IN NOT AFFIRMING THE DISTRICT COURT JUDGMENT ON QUALIFIED IMMUNITY GROUNDS

In remanding this case for a new trial, the Third Circuit recognized both the "evolving nature of the rights in issue," [45] and that defendants were not "charged with predicting the future course of constitutional law." 644 F.2d at 171 (Pet. App. 43a). Nevertheless, it remanded the case for a jury determination on the "possibility of immunity." *Id.* at 171-72 (Pet. App. 43a). Where, as here, there is no evidence of "subjective" bad faith and the only remaining issue—"objective" good faith—is purely a question of law, judgment should be entered for defendants.

It is well settled that state officials are immune from civil rights liability when they act in good faith. *Procunier v. Navarette*, 434 U.S. 555 (1978); *O'Connor v.*

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[44] *See, e.g.*, R. 5-44-56, 242-50.

[45] Indeed, the majority opinion begins: "The present controversy inhabits the twilight area of developing law concerning the constitutional rights of the involuntarily committed mentally retarded." 644 F.2d at 154 (Pet. App. 3a).

Donaldson, supra; Wood v. Strickland, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The applicable standard was stated in *Scheuer* as follows:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48. The good faith immunity standard has both a "subjective" and "objective" element. *Wood, supra* at 312. If the official either (1) "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . .," or (2) "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the [plaintiff's] constitutional rights . . .," the immunity defense is not available. *Id.* at 322.

As to the first part of this test, the "subjective" aspect, the record is totally devoid of any evidence of intent by the defendants to injure Romeo or violate his rights, let alone any malicious intention.[46] To the contrary, the record is replete with evidence as to how each of the defendants tried to help him.[47] Indeed, on this basis alone, defendants' motion for a directed verdict should have been granted.

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[46] None of the opinions filed by the court below even suggested that such evidence was present.

[47] *See, e.g.*, R. 5-229, 236-37, 242-50; 6-28-30, 46-47, 133, 139-40; D.Ex. 10, R. 6-195, 7-86.

As to the "objective" part of the test, this Court has noted that state officials "cannot be expected to predict the future course of constitutional law." *Procunier, supra* at 562. It is only where the constitutional right "was clearly established at the time of [the] challenged conduct" that the test has not been met. *Id.* By its very nature, in a jury trial, this determination must be made by the trial judge.[48] Despite the expertise of jurors in resolving factual disputes, short of giving them a crash course in constitutional law, they cannot reasonably be expected to decide whether a particular constitutional right was clearly established at a particular point in time. Indeed, this task is difficult for even trial and appellate court judges. Where a court of appeals creates new constitutional rights on appeal from a jury verdict for defendants, any remand order should recognize that "objective" good faith is not at issue on remand.

Here, there can be no other conclusion than that the constitutional rights found by the Third Circuit majority were not clearly established between 1974 and 1978. If the District Court judge in 1978 and four of the nine judges on the Third Circuit in 1980 were not convinced that such rights existed, Duane Youngberg, Dick Matthew and Marge Conley cannot be charged with such knowledge prior to 1978.[49]

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[48] For example, in *Procunier, supra*, this Court held that the District Court properly entered summary judgment for defendants on the immunity issue. *See also Dilmore v. Stubbs*, 636 F.2d 966 (5th Cir. 1981) (trial judge's grant of defendants' directed verdict motion on qualified immunity grounds affirmed).

[49] In *Dilmore v. Stubbs, supra*, a remarkably similar situation was presented to the Fifth Circuit this year. A mentally ill person had brought an action challenging that his confinement at the Mississippi State Hospital violated constitutional rights to be protected from harm and to be held in the least restrictive environment. The District Court directed a verdict for defendants on the qualified immunity issue and the Fifth Circuit affirmed, reasoning that the rights at issue were "anything but settled and indisputable." 636 F.2d at 971.

Thus, even if the Third Circuit was correct in its ruling on Romeo's constitutional rights, the judgment of the District Court should be affirmed on immunity grounds.

CONCLUSION

The decision of the Third Circuit Court of Appeals should be vacated with directions to affirm the judgment of the District Court.

Respectfully submitted,

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